INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1136

MURRAY TILLMAN, *et al.*,

Petitioners,

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS[1]

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B1-B31)[2] is reported at 451 F.2d 1211. The District Court's opinion (Pet. App. C1-C13) is unreported.

---

[1] Petitioners, in addition to Murray Tillman, are Rosalind N. Tillman, his wife, Dr. Harry C. Press and Francella Press, his wife, and Mrs. Grace Rosner. Respondents, in addition to Wheaton-Haven Recreation, Inc., are Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, Richard E. McIntyre, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr. and James M. Whittles, individuals who were officers and/or directors of said corporation at times material herein (A. 8, 23).

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "A." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1971. A petition for rehearing and suggestion for rehearing *en banc* was duly filed and the court of appeals entered its order of denial on December 16, 1971 (A. 40). The petition for a writ of certiorari was filed on March 13, 1972, and was granted on May 15, 1972. The jurisdiction of this court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding a community recreation association to be a private club and hence exempt from civil rights statutes which prohibit racial discrimination (42 U.S.C. §§1981, 1982 and 42 U.S.C. §2000a), despite the fact that this Court in a previous case (*Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969)) held that an association with virtually identical characteristics could not lawfully discriminate on the basis of race with respect to persons seeking to use its facilities.

STATUTES INVOLVED

The relevant provisions of the Civil Rights Act of 1866, as incorporated in 42 U.S.C. §§1981, 1982, are as follows:

> §1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens * * * .

§1982. All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The relevant provisions of Title II of the Civil Rights Act of 1946 (42 U.S.C. §2000a) are as follows:

§201(a) (42 U.S.C. Sec. 2000a(a)). All persons shall be entitled to the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

§201(b) (42 U.S.C. §2000a(b)). Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce * * * :

* * *

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; * * *

* * *

§201(c) (42 U.S.C. §2000a(c)). The operations of an establishment affect commerce within the meaning of this title if * * * (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films,

performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; * * *

* * *

§201(e) (42 U.S.C. §2000a(e)). The provisions of this title shall not apply to a private club or other establishment not in fact open to the public * * *

* * *

STATEMENT[3]

A. WHEATON-HAVEN RECREATION ASSOCIATION, INC.– ITS PURPOSE AND MANNER OF OPERATION

Wheaton-Haven Recreation Association, Inc. is a nonprofit Maryland corporation organized in 1958 for the purpose of operating a swimming pool in an area of Silver Spring, Maryland (Pet. App. C1; A. 7-8, 23). The pool was financed by subscriptions for membership collected from persons residing in the area. The pool presently charges a $375 initiation fee and an annual dues of $150-$160 (Pet. App. C1-C2; A. 44). The by-laws of the association provide that membership "shall be open to bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool" (Art. III, §1, Pet. App. C2; A. 43). Members may be taken from

---

[3] The facts stated herein are based on the district court's findings as modified by the court of appeals.

outside the three-quarter mile radius upon the recommendation of a member as long as members from outside the area do not exceed 30 percent of the total membership (Pet. App. C2; A. 43).[4] In either event, the by-laws provide that applicants for membership must be approved by "an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose" (Art. III, §3, Pet. App. C2; A. 43).

Membership, which is by family units rather than by individuals, is limited to 325 families (Art. III, §§6, 7, Pet. App. C2; A. 43-44). If a member who is also a homeowner sells his property and resigns his membership, his purchaser receives a first option to purchase his membership, subject to the approval of the Board of Directors (Art. VI, Pet. App. C2; A. 47).

Only members and their guests are admitted to the pool. Members of the general public cannot gain admittance by payment of an entrance fee (Pet. App. C2-C3; A. 42-43).

The Wheaton-Haven pool was constructed in 1958-1959 by a contractor from outside the State of Maryland (Pet. App. C3; A. 9, 23, 87, 92). The pool's operation involves the use of pumps, a motor and a chlorine feeder, all manufactured outside of Maryland. There are also snack vending machines. All of these facilities are in an enclosed area accessible only to members and their guests (Pet. App. C3; A. 41, 122-123).

---

[4] At times when the membership rolls are full, applicants for membership are limited to the geographic area within a three-quarter mile radius of the pool, and such applications are considered in chronological order of receipt (Art. V, §3, A. 46).

The pool was constructed pursuant to a "special exception" granted by the Montgomery County Board of Appeals under the county's zoning ordinance (Pet. App. C3-C4; A. 8, 23, 96, 98).[5] Prior to granting the exception, the zoning authority required Wheaton-Haven to demonstrate its financial responsibility by submitting evidence that 60 percent of its projected construction costs were obligated or subscribed (A. 96, 99).

Wheaton-Haven pays state and local property taxes, but is exempt from state and federal income taxes under Maryland Code Ann. Art. 81, §288(d)(8), and §501(c)(7) of the Internal Revenue Code (26 U.S.C. §501(c)(7)) exempting non-profit, membership-owned and controlled recreational facilities (Pet. App. C4; A. 97, 99).

B. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY MEMBERSHIP AND GUEST POLICIES

Dr. and Mrs. Harry C. Press, two of the Negro plaintiffs, own a home within the three-quarter mile radius of the pool (Pet. App. C3; A. 11-12). The previous owner of the home was not a member of Wheaton-Haven. In the spring of 1968, Dr. Press sought to obtain a membership application from members of the association's Board of Directors, who declined to furnish him with an application

---

[5] The provisions of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955. In the ordinance, the Council stated, "... this action sets up the community swimming pools as a special exception ... Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefited by such development" (A. 9, 62, 96, 98).

(Pet. App. C3; A. 11, 97, 99). The stipulated reason for their refusal was his race (Pet. App. C3; A. 90, 95).

Mr. and Mrs. Murray Tillman are white members of Wheaton-Haven. On July 19, 1968, the Tillmans brought Mrs. Grace Rosner, a Negro, to the pool as their guest. She was admitted (Pet. App. C3; A. 12). The following day, at a special meeting, the Board of Directors promulgated a rule limiting guests to relatives of members (Pet. App. C3; A. 12, 97, 99). Mrs. Rosner has been refused admission as a guest of the Tillmans since then (Pet. App. C3; A. 12, 90, 95). The new guest policy was adopted in response to the Tillman's bringing a Negro guest to the pool, though it was intended also to reduce the burgeoning number of guests using the pool (Pet. App. C3; A. 12, 90, 95, 115-117).[6]

At a meeting of the association's members in the fall of 1968, a resolution was adopted reaffirming Wheaton-Haven's policy of not admitting Negroes to its facilities (Pet. App. B30; A. 109, 90, 95).

C. PROCEEDINGS BELOW

Petitioners brought their complaint in the United States District Court for the District of Maryland, seeking declaratory and injunctive relief, as well as damages. They claimed that Wheaton-Haven's racially discriminatory policies violated their rights under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982 and under the Civil Rights Act of 1964 (42 U.S.C. 2000a).

The district court (Northrop, J.) denied the relief sought by plaintiffs, and granted summary judgment to defendants below (Pet. App. C1-C13). Before the court of appeals,

plaintiffs' motion for summary reversal was denied, and following consideration of the merits, a majority of the panel (Haynsworth, Chief Judge, and Boreman, Circuit Judge) affirmed the district court, holding that Wheaton-Haven is a "private club" and hence exempt from the Civil Rights Act of 1866 as well as the Civil Rights Act of 1964 (Pet. App. B1-B23). Judge Butzner, dissenting, would have granted plaintiff's motion for summary reversal of the district court. He found the case to be "indistinguishable in all material aspects" from *Sullivan v. Little Hunting Park, supra,* and hence termed the majority decision "a marked departure from authoritative precedent" (Pet. App. B23). Judges Winter and Craven dissented from the court's denial of rehearing *en banc,* and expressed their agreement with Judge Butzner's view that the case is indistinguishable from *Sullivan* (Pet. App. B31). Finally, all three dissenting judges deplored the majority's holding that the 1866 Act was impliedly repealed in part by the 1964 Act.

SUMMARY OF ARGUMENT

This case involves the question whether a community recreation association established to operate a swimming pool for the benefit of all residents of a neighborhood may exclude persons otherwise eligible on the basis of race. In *Sullivan v. Little Hunting Park, supra,* 396 U.S. 229, the Court held that such an association, which has no other criteria for membership than residence within a prescribed area, is not a "private club" because it lacks a "plan or purpose of exclusiveness," and therefore is subject to applicable laws prohibiting racial discrimination.

Wheaton-Haven Recreation Association, Inc., whose racially discriminatory membership and guest policies are at

issue here, is typical of many such non-profit associations organized in suburban neighborhoods by residents who contribute their time and energy to establish neighborhood recreational facilities for themselves and their families. Wheaton-Haven's by-laws specify that membership in the association is open to everyone residing within a three-quarter mile radius of its swimming pool. Community recreation facilities, particularly a swimming pool, obviously are a major factor affecting the desirability and attractiveness of residential property. The availability of such facilities for all white residents of a neighborhood and the routine exclusion of Negroes, will both discourage the latter from buying in that community and make any purchase they do make a poorer bargain than a white citizen could obtain. To thus allow an association such as Wheaton-Haven to exclude Negroes from community recreation facilities places in the hands of this private group the power to control the racial composition of a neighborhood, a result comparable to enforcement of a racially restrictive covenant.

The close relationship between membership in Wheaton-Haven and the ownership of property in the neighborhood served by the pool is shown by the provision of the association's by-laws giving a member who sells his home the right to make his membership available for purchase by the buyer of his home, despite the fact that there may be a waiting list of persons who have been seeking memberships for a substantial period of time. This nexus between membership in the pool and the passage of title to real property in the neighborhood which it serves, and the fact that the home buyer in such circumstances has priority in obtaining a membership over those on the waiting list, evidences the fact that the organizers of Wheaton-Haven were well aware that the availability of a pool membership

would add to the attractiveness and value of their homes. This provision of Wheaton-Haven's by-laws refutes any claim of exclusiveness the association might make, since one's eligibility for membership in such circumstances is entirely a function of who he buys his house from.

The Civil Rights Act of 1866 (42 U.S.C. §§1981, 1982) protects Negroes against private acts of discrimination in transactions based on contract, and in matters involving the ownership or possession of real or personal property. Rights of petitioners secured by the Act of 1866 are violated by Wheaton-Haven's racially discriminatory membership and guest policies. Wheaton-Haven's racist policies also violate plaintiffs' rights under the Civil Rights Act of 1964 (42 U.S.C. 2000a).

This case is indistinguishable in all material aspects from *Sullivan v. Little Hunting Park, supra,* and the court below erred in failing to follow that precedent. The court assumed differences between the two cases where in fact none exist, and it relied on an invalid factual analysis of the two cases to support its determination not to be bound by *Sullivan.*

ARGUMENT

I. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY POLICIES VIOLATE THE CIVIL RIGHTS ACT OF 1866 (42 U.S.C. §§1981, 1982)

A. The remedy provided by the Act of 1886 for racially discriminatory conduct should be broadly construed

Section 1 of the Act of April 9, 1866, 14 Stat. 27, entitled "An Act to protect all Persons in the United States

in their Civil Rights, and furnish the means of their Vindication," provides as follows:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.

In codifying this section, it was divided into two parts, 42 U.S.C. §§1981 and 1982, but the language remained essentially unchanged with §1981 securing the right to "make and enforce contracts" and §1982 securing the right to "inherit, purchase, lease, sell, hold, and convey real and personal property."

In *Jones v. Mayer Co.*, 392 U.S. 409 (1968), the Court exhaustively reviewed the legislative history of Section 1 of the Act of 1866. The congressional debates and historical circumstances attending passage of the law were

examined in detail, leading the Court to conclude that, "In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein * * *" 392 U.S. at 436.

The Civil Rights Act of 1866 was enacted by Congress pursuant to the Thirteenth Amendment which, as its text[6-7] reveals, "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Not only did the Thirteenth Amendment, abolish slavery and establish universal freedom, but it did much more. As the Court has stated, its enabling clause "clothed 'Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*'" (emphasis in original). *Jones v. Mayer Co., supra*, 392 U.S. at 439, quoting *Civil Rights Cases, supra*, 109 U.S. at 20. Under the Thirteenth Amendment, the Court held, Congress has the power "rationally to determine what are the badges and incidents of slavery and to

---

6-7 The Thirteenth Amendment states:

> Section 1. Neither slavery nor involuntary servitude, except punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

translate that determination into effective legislation." *Jones v. Mayer Co., supra,* 392 U.S. at 440.

The Congress that passed the Civil Rights Act of 1866, as the Court has noted, "had before it an imposing body of evidence pointing to the mistreatment of Negroes by private individuals and unofficial groups * * *. The congressional debates are replete with references to private injustices against Negroes – references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities" (footnotes omitted). *Id.* at 427-428. The history of the 1866 Act, therefore, reveals congressional objectives for the legislation that "belie any attempt to read it narrowly." *Id.*, at 431. Senator Turnbull, the author of the Act, declared that it was intended to affirmatively secure for all men, whatever their race or color, "great fundamental rights," including "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property." *Id.*, at 431-432. As to those basic civil rights," the Court has noted, the Act was intended to "break down *all* discrimination between black men and white men" (emphasis in original). *Id.*, at 432.

In *Jones v. Mayer Co.*, the Court held that the Act of 1866 must be accorded "a sweep as broad as its language." *Id.*, at 437. Summarizing the broad import of the statute in language reiterated in *Sullivan v. Little Hunting Park, supra,* 396 U.S. at 235-236, the Court stated (392 U.S. at 443):

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom – freedom to "go and come at pleasure" and to "buy and sell when they please" – would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the nation cannot keep (footnotes omitted).

The refusal to sell a home to a person because of his race was held in *Jones v. Mayer Co.* to be violative of 42 U.S.C. §1982. In *Sullivan v. Little Hunting Park* the Court held that a membership share in a community recreation association which had been assigned as part of a lease for the use of the tenant fell within the protection of §1982, and hence could not be disapproved by the association's board of directors merely because the tenant was a Negro. Significantly, in both cases the Court, specifically rejected the assertion that, by enacting comprehensive civil rights legislation in recent years, Congress impliedly repealed the Act of 1866. Thus, the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968 (42 U.S.C. §§3601, *et seq.*) is quite different in scope of coverage and method of enforcement from the Act of 1866. Further, Congress was aware of the earlier law's provisions at the time it adopted

the 1968 statute. *Jones v. Mayer Co., supra,* 392 U.S. at 413-417. Likewise, in *Sullivan v. Little Hunting Park* the Court held that the Act of 1866 is not superseded by the Public Accommodations provisions of the Civil Rights Act of 1964 (42 U.S.C. 2000a). The two laws are "plainly 'not inconsistent'" and the later law in no way impairs the sanction of the earlier. 396 U.S. at 237-238.[8]

Since the decision in *Jones v. Mayer Co.*, a considerable body of case law has developed giving further importance to the Act of 1866 as a means of securing equality for Negroes. In *Sullivan v. Little Hunting Park*, the Court re-emphasized the "broad and sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866," and admonished against a "narrow construction" of the statutory language. 396 U.S. at 237. Hence, the 1866 Act has been applied by lower courts to prohibit racially discriminatory practices in employment, housing, public accommodations and education.

To date, five circuit courts of appeals have recognized 42 U.S.C. §1981 as a basis for relief from private racial discrimination in employment. In giving effect to the remedy, provided by this section, these courts have uniformly

---

[8] This express holding by the Court in *Sullivan* was disregarded by the court of appeals in the case at bar. Taking a position directly contrary to this Court's ruling, the majority below held that because the 1964 Public Accommodation provisions contain an exemption for private clubs, a like exemption is to be read into the 1866 Act. The majority stated, "This exception to the ban on racial discrimination of necessity operates as an exception to the Act of 1866 in any case where the Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act" (Pet. App. B6). This is one of several examples, as discussed more fully below, of the court of appeals' demonstrated lack of regard for precedent set by this Court.

rejected the contention that the subsequent enactment of Title VII (Fair Employment Title) of the Civil Rights Act of 1964 (42 U.S.C. §2000e, *et seq.*) invalidated the earlier law. *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (C.A. 5, 1970); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1016-1017 (C.A. 5, 1971); *Brady v. Bristol-Meyers, Inc.*, decided May 8, 1972, 4 FEP Cases 749 (C.A. 8); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (C.A. 4, 1972); *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757, 758-763 (C.A. 3, 1971); *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 481-488 (C.A. 7, 1970), cert. denied, 400 U.S. 911. See also Larson, *The Development of §1981 as a Remedy for Racial Discrimination in Private Employment*, 7 Harv. Civ. Rights L. Rev. 56 (1972).

§§1981 and 1982 of the 42 U.S.C. have also been applied by courts to remedy racial discrimination in housing (*e.g., Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (C.A. 5, 1970), 444 F.2d 143 (C.A. 5, 1971); *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349 (C.A. 7, 1971), *Knight v. Auciello*, 453 F.2d 852 (C.A. 1, 1972); *McLaurin v. Brusturis*, 320 F. Supp. 190 (E.D. Wis., 1970); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex., 1971)); in connection with admission to an outdoor recreational facility (*Scott v. Young*, 421 F.2d 143, 145 (C.A. 4, 1970), cert. denied, 398 U.S. 929); admission to a trade school (*Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C., 1971), and in the purchase of a cemetery plot (*Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala., 1969)).

B. Rights secured to petitioners by the Act of 1866 are violated by Wheaton-Haven's racially discriminatory membership and guest policies

Wheaton-Haven Recreation Association, Inc. is all but indistinguishable from Little Hunting Park, Inc., the organization which was at issue in the *Sullivan* case. Each is a voluntary association organized to operate a community recreation facility, primarily a swimming pool, for residents of a prescribed neighborhood.[9] Here, as in the *Sullivan* case, the structure and function of the recreation association compel the conclusion that reliance on racially discriminatory criteria for determining those eligible to use its facilities is violative of the Civil Rights Act of 1866.

As shown *supra*, p. 7, solely because they are Negroes, Dr. and Mrs. Press were denied the right, which is available to others living in the neighborhood, to purchase a Wheaton-Haven membership share and thereby use the association's recreational facilities. Since the purchase of such a share involves making a contract, the denial to the Press' on the basis of race of the right to enter into such a transaction violated their right secured by §1981 not to be discriminated against in such matters. Likewise, because under common law principles a membership share in Wheaton-Haven,

---

[9] Such cooperatively established recreation associations formed to operate neighborhood swimming pools are particularly common in areas where public swimming pools and beaches are not readily accessible. Petitioners' brief to this Court in the *Sullivan* case (p. 24) noted that in the Northern Virginia suburbs of Washington, D.C., where Little Hunting Park is located there are about 50 community pool associations; there are about 42 such associations in Montgomery County, Maryland, where Wheaton-Haven is located. *The Washington Post*, p. A-20, June 12, 1967; *The (Washington) Evening Star*, p. B-1, Noon edition, April 25, 1969.

a non-stock corporation, constitutes personal property,[10] the discriminatory refusal to permit Dr. and Mrs. Press to purchase such property on the same basis as white persons constituted a violation of §1982. Real property interests subject to the protection of §1982 are also adversely affected by Wheaton-Haven's refusal to allow Dr. and Mrs. Press access to its facilities. Thus, occupancy of their home is rendered less valuable and enjoyable when use of the community swimming pool, which is available to all white residents of the neighborhood, is denied to them because they are black. Further, since under Wheaton-Haven's by-laws the purchaser of a home has the first option to buy the pool membership of his seller, a home obviously may be more valuable on the market if it carries with it an option to purchase such a membership. However, this increment in property value is denied to Negro homeowners such as Dr. and Mrs. Press, since they can have no option to convey. Finally, since membership priority in Wheaton-Haven is given to persons residing within a three-quarter mile radius of the pool, homeowners within that area, of whatever race, who decide to sell to a Negro must be prepared to accept any loss in value to their property resulting from the racial restriction on use of the swimming pool.

Mr. and Mrs. Murray Tillman have a property interest in Wheaton-Haven's pool and recreation facilities as a result of being shareholders, as well as a contractual relationship with the association based on the by-laws and rules and regulations applicable to all members. Under the by-laws and rules, members generally have a right to bring guests

---

[10] *Hyde v. Woods*, 4 Otto 523 (1877); *Page v. Edmunds*, 187 U.S. 596 (1903).

to the pool. The association, by adopting the rule limiting guest privileges to relatives of members, at least partially, in order to impose a racial limitation on the right to bring guests and thereby prohibit Mr. and Mrs. Tillman from taking Mrs. Grace Rosner, a Negro, or for that matter any Negro, to the pool, has created an unlawful racial restriction on the Tillman's property interests, as well as on their contractual relationship with the association. This racial restriction is plainly impermissible in the face of §§1981 and 1982. Since, as shown above, the racial restriction also limits the market for the sale of the Tillman's home and thereby diminishes its value, the restriction is further violative of §1982. Although the Tillmans are white, since they stand in the role of persons seeking "to vindicate the rights of minorities" protected by the statute, they have standing to maintain this action. *Sullivan v. Little Hunting Park, supra,* 396 U.S. at 237; *Walker v. Pointer,* 304 F. Supp. 56, 58-61 (N.D. Tex., 1969).

Mrs. Grace Rosner, as the Negro guest of the Tillmans, similarly has rights under §§1981 and 1982, which were violated by respondents. As the Court held in *Walker v. Pointer, supra,* 304 F. Supp. at 60-62, a guest has an implied easement of ingress and egress, or a license, which constitutes property. Hence, to apply the association's racially restrictive guest policy is to deny prospective Negro guests the right to acquire and enjoy such an easement, as well as the opportunity to receive from members a license or other possessory interest concerning permissible actions while on association property. See *Collyer v. Yonkers Yacht Club,* 17 A.D. 2d 973, 234 N.Y.S. 2d 259 (1962). (social guest of members of club is business invitee); Restatement (Second) of Torts, §§330, 332 (1965). It should be further noted that Mrs. Rosner stood in the role of a

third person beneficiary to the contract between the Tillmans and Wheaton-Haven, which incorporated a general policy of permitting members to take guests to the pool. See generally 17 Am. Jur. 2d Contracts, §§302-319. As a third person beneficiary, Mrs. Rosner had the right under §1981 not to be denied performance of the contract because of the imposition of a racial condition.

C. Wheaton-Haven lacks the characteristic of exclusiveness associated with a truly private club, since membership is open to all residents of the area prescribed by its by-laws.

By sanctioning the exclusion of Negroes from the community recreation facilities operated by Wheaton-Haven, the court of appeals has squarely contravened this Court's decision in *Sullivan v. Little Hunting Park*. Both this case and *Sullivan* involve voluntary associations organized by residents of neighborhood to provide opportunities for recreation for themselves and others in the area, principally by the construction and operation of a swimming pool. In each instance membership in the association, and hence, use of its facilities, is available to everyone residing in the area defined by its by-laws. In neither case did the association pursue a policy of exclusiveness until a black resident of the neighborhood sought the privileges of membership for himself and his family. In *Sullivan*, as here, the court below held that the association could properly exclude the black applicant on the ground that the association was a "private club." In *Sullivan*, however, this Court declared that it found "nothing of the kind on this record." 396 U.S. at 236. The Court continued (*ibid.*):

> There was no plan or purpose of exclusiveness. It is open to every white person within

the geographic area, there being no selective element other than race.

Wheaton-Haven similarly has "no plan or purpose of exclusiveness." Its by-laws specify that membership "shall be open to bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool." Unlike the conventional social club, fraternal lodge, or similar organization, personal compatibility with other members is not a qualification for membership in Wheaton-Haven. In conventional social or fraternal organizations – those having as their principal purpose the fostering of fellowship and camaraderie – friendship, tradition and common social, educational or occupational backgrounds play a major role in determining membership eligibility. For Wheaton-Haven, however, the sole determinant of membership is residence within the prescribed area. No further qualification, recommendation, or nomination is required. It is inconsistent with the nature of a truly private club for an organization, in determining membership eligibility, to rely solely on geography, to the exclusion of all other factors – except race. *Nesmith v. Y.M.C.A. of Raleigh, N.C.*, 397 F.2d 96, 102 (C.A. 4, 1968); and see *United States v. Richberg*, 398 F.2d 523 (C.A. 5, 1968); *Rockefeller Center Luncheon Club, Inc. v. Johnson*, 131 F. Supp. 703, 705 (S.D. N.Y., 1955). Wheaton-Haven is functionally similar to the recreational facility in *Daniel v. Paul*, 395 U.S. 298 (1969). The Court there held that an establishment which is "open in general" to "all members of the white race" may not masquerade as a private club merely in order to exclude Negroes from its facilities. 395 U.S. at 302.

Nor is the missing element of selectivity supplied by the fact that under Wheaton-Haven's by-laws, in addition to

the residence requirement, membership applications are subject to approval by a majority vote at a meeting of the membership or of the Board of Directors. There is no evidence that any factor other than area of residence or race has ever been considered as a basis for such votes. Indeed, it is clear that membership approvals are given as a routine matter, as shown by the fact that in Wheaton-Haven's 11-year history prior to the events herein, only one person had ever been rejected for membership. The record does not disclose either the race of that applicant or place of residence at the time of the rejection (Pet. App. B21; A. 88, 93).[11]

Any claim of exclusivity by Wheaton-Haven has a particularly hollow ring, in view of its by-laws provision which gives a member who sells his home the right to make his membership share available for purchase by his vendee, notwithstanding the fact that there may be a waiting list consisting of persons who have been seeking memberships for a substantial period of time.[12] The accident of who one buys his home from, therefore, determines membership eligibility in those circumstances. This by-laws provision

---

[11] The court of appeals erroneously relied on the unsubstantiated claim of defendants' counsel at oral argument that "numerous" other unidentified white persons were informally rejected for membership by being denied an application form (Pet. App. B21, n. 23). This claim is contradicted by defendants' sworn answer to plaintiffs' interrogatory No. 17, which reflects only one rejection for membership, formal or informal, and gives no indication that there were others whose identity was unknown (A. 88, 93).

[12] Thus, Article VI of the by-laws provides that when the membership rolls are full, the association is required to purchase the share of the vendor who wishes to transfer his share to his vendee. Upon receipt of the vendor's resignation, the association must give the vendee first option to purchase the share (A. 47).

further demonstrates that the organizers of Wheaton-Haven were well aware of the important asset that the swimming pool would be to their neighborhood, and that they would increase the attractiveness and value of their homes by being able to assure a potential purchaser not only of the availability of a pool membership, but that if there was a waiting list, the buyer would have the unqualified right to purchase the seller's pool membership.

In view of the membership priority thus given to persons purchasing homes from Wheaton-Haven members, and the priority given generally to persons residing within a three-quarter mile radius of the pool, it is apparent that use of Wheaton-Haven's facilities is in fact an incident of "residence" in the neighborhood served by the pool. Hence, the association's racially discriminatory admission policies cannot be disassociated from other factors generally responsible for residential segregation by race which, unfortunately, is still all too prevalent in this country. The enactment of numerous fair housing laws, federal, state and local, in recent years reflects the national commitment to combat this problem. However, it is clear that the routine exclusion of Negroes from neighborhood recreation facilities would both discourage them from buying in that neighborhood, and make any purchase they did make a poorer bargain than that a white citizen can make. "Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians." *Barrows v. Jackson*, 346 U.S. 249, 254 (1953). As the Court stated in *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 236, "What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley v. Kraemer*, 334 U.S. 1 [1948] * * *"

D. There are no valid grounds for distinguishing this case from *Sullivan v. Little Hunting Park*

Faced with the compelling precedent of *Sullivan v. Little Hunting Park*, and the unassailable conclusion of Judges Butzner, Winter and Craven, in dissent, that this case is "indistinguishable" from *Sullivan*, the majority of the court below nevertheless assumed differences between the two cases where in fact none exist, and constructed a false factual analysis of the two cases to support its determination not to be bound by *Sullivan*.[13]

1. The court of appeals made the *clearly erroneous* assumption that Little Hunting Park's recreation facilities, which were involved in *Sullivan*, were built by the same real estate developers who built the subdivisions named in that organization's by-laws, and that therefore the right to use those facilities is incidental to the acquisition of a lot in one of those subdivisions (Pet. App. B9, n. 8, B16). This assumption is belied by the record of the *Sullivan* proceeding in this Court, which was before the court of appeals.[14] The court of appeals' attention was called to

---

[13] The court of appeals did not rely on the district court's reasons for determining that Wheaton-Haven is a private club, but instead stated its own grounds to support its conclusion.

[14] The printed appendix to the briefs used in this Court in the *Sullivan* case was submitted to the court of appeals at oral argument by petitioners' counsel, and was relied upon by the court in writing its opinion. In addition, excerpts from the *Sullivan* appendix, have been designated by petitioners for inclusion in the appendix to the briefs in the instant case (A. 64-84). Petitioners respectfully request this Court to take judicial notice of those portions of the *Sullivan* record. *United States v. Pink*, 315 U.S. 203, 216 (1942); *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 336 (1930).

the fact that there was no connection between Little Hunting Park and any commercial builder, and that the association there, like Wheaton-Haven, is a voluntary organization formed by residents of an area who joined together to build and operate a neighborhood recreation facility (A. 65-76, 77-78).

2. The court of appeals made the *clearly erroneous* assumption that in order to be eligible for membership in Little Hunting Park one is required to own property within a prescribed geographic area (Supp. App. B15). The record of the *Sullivan* case shows that out of an authorized membership of 600, 133 members resided in areas outside of the prescribed area at the time they acquired membership, and there is no evidence that at the time of acquiring membership any of them owned property in that area (A. 84). A similar situation exists with respect to Wheaton-Haven which allows persons residing outside the three-quarter mile eligibility area to join upon the recommendation of a member as long as such persons do not exceed 30 percent of the total membership (*supra*, pp. 4-5).[15]

3. The court of appeals made the *clearly erroneous* assumption that Wheaton-Haven has a greater degree of "exclusivity" than Little Hunting Park, which distinguishes

---

[15] Contrary to the court of appeals' supposition (Supp. App. B15, n. 17), the Little Hunting Park eligibility area was extended several times to include areas in addition to the four subdivisions specified in the by-laws (A. 82-84). Further, there is no basis for the court's the "leap to suppose" (Supp. App. B15, n. 17) that such additional areas were opened by the same developers who had opened the original four. As shown above, the subdivisions surrounding Little Hunting Park were built long before the recreation association was organized, and builders had nothing to do with its formation.

this case from *Sullivan* and gives Wheaton-Haven license to discriminate against Negroes. The court relies on the fact that in Wheaton-Haven's 11-year history one applicant for membership was rejected (Supp. App. B20-B21). The court, however, completely ignores the fact from the *Sullivan* record, which was brought to its attention, that in the 12 years of Little Hunting Park's existence *one applicant for membership was also rejected* (A. 79).[16]

4. The court of appeals made the *clearly erroneous* finding that the option to buy a membership in Wheaton-Haven which the purchaser of a home obtains when his vendor resigns his membership is "utterly without use or value" (Supp. App. B13). The court arrived at this finding by erroneously relying on the unsubstantiated claim of defendant's counsel at oral argument that Wheaton-Haven's membership had been 260 families for several years, less than its maximum limit of 325 (Supp. App. B2, n. 1). The Court reasoned that the option has no value unless the membership rolls are full. When it was pointed out in the petition for rehearing that the membership rolls were full to the 325 maximum in the spring of 1968 when Dr. Press sought membership, and that he would have been placed on the waiting list, if he had not been discriminated against, the court corrected its findings to reflect full membership at that time (Supp. App. B30; A. 88, 92, 105-106). However, the court did not alter its conclusion that the option is of no use or value.

---

[16] The court of appeals, in Part III of its opinion, cited various features of Wheaton-Haven as "indicators of its private nature" (B18). Every one of the factors referred to, however, is also characteristic of Little Hunting Park, which was held by this Court not to be a private club.

The court's adherence to its conclusion, despite the demonstrated error of its underlying factual finding illustrates the erroneous approach taken by the court to this case. Its opinion is based on previously arrived at determinations, and facts were fashioned to provide their justification. In actuality, the question of whether Wheaton-Haven's membership rolls are full, or not full, at any given time has nothing to do with whether the purchase of a membership share involves contractual and property rights falling under the protection of 42 U.S.C. §§1981, 1982. However, by seizing on this and other irrelevant factors in analyzing this case and *Sullivan*, the court relied upon wholly invalid grounds for distinguishing the two cases.

II. WHEATON-HAVEN'S RACIALLY DISCRIMINATORY POLICIES VIOLATE THE CIVIL RIGHTS ACT OF 1964 (42 U.S.C. §2000a)

Title II of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000a) prohibits racial discrimination in "any place of public accommodation," which is defined to include any "place of entertainment" if its "operations affect commerce". In *Daniel v. Paul, supra*, 395 U.S. 298, the Court held that a recreational establishment in which persons are not passive spectators, but are direct participants, is a "place of entertainment" within the meaning of the statute. The Court also held in *Daniel* that recreational equipment and apparatus originating out of the state constituted "sources of entertainment which move in commerce" for the purposes of subsection (c)(3) of the statute. In reaching the latter conclusion, the Court adopted the view previously taken by the Court of Appeals for the Fifth Circuit that the phrase "move in commerce" in subsection (c)(3) includes sources of entertainment, such as equipment and

supplies, which had moved in interstate commerce but which have come to rest at the place of entertainment. See *Miller v. Amusement Enterprises, Inc.*, 394 F.2d, 342, 351-352 (C.A. 5, 1968). Accord: *Scott v. Young, supra*, 421 F.2d at 144 (C.A. 4). *United States v. Central Carolina Bank & Trust Co.*, 431 F.2d 972 (C.A. 4, 1970).

In the instant case, as shown *supra*, p. 5, the Wheaton-Haven pool was constructed by a contractor from outside the State of Maryland and the operations of the pool involve the use of machinery and equipment manufactured in other states. Hence, there can be no question under the relevant authorities that the necessary link to interstate commerce is present. *Daniel v. Paul, supra; Scott v. Young, supra.*[17]

The Civil Rights Act of 1964 has a specific provision exempting from coverage "a private club or other establishment not in fact open to the public." Consistent with its holding that Wheaton-Haven is not subject to the Act of 1866 because of its status as a private club, the court below held that the Act of 1964 similarly is inapplicable because of the private club exemption. This Court's holding in *Sullivan v. Little Hunting Park*, and the discussion *supra*, pp. 20-27, amply demonstrate, we believe, that Wheaton-Haven lacks the degree of exclusiveness sufficient to exempt it from coverage of the 1964 Act. Nor can it

[17] The performance of services by a contractor from another state suffices to bring a facility within the scope of interstate commerce. *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 341 U.S. 694, 699 (1951); *National Labor Relations Board v. National Survey Service*, 361 F.2d 199, 203-204 (C.A. 7, 1966), and cases cited; *National Labor Relations Board v. Local 1423, United Brotherhood of Carpenters*, 238 F.2d 832, 835 (C.A. 5, 1956); *National Labor Relations Board v. The Austin Co.*, 165 F.2d 592, 594 (C.A. 7, 1947).

be maintained that Wheaton-Haven is "not in fact open to the public." For the record shows that it is open to everyone residing within the three-quarter mile radius which it serves. The numerical limit on memberships to 325 families does not compel a contrary conclusion, for that is merely a means of preventing overcrowding of the facilities. The observance of such a limitation in the interest of health and safety is no more indicative of private club status for Wheaton-Haven than it is for a theatre or restaurant which similarly limits its number of patrons. Nor is it significant that Wheaton-Haven requires payment of an annual fee, rather than individual admission charges, for the use of its facilities. The fact is that the Wheaton-Haven pool is "open to any white individual" or family residing within the prescribed area "who can afford the yearly membership rates." *Nesmith v. Y.M.C.A. of Raleigh, N.C., supra*, 397 F.2d at 101 (C.A. 4).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to remand to the district court for further appropriate proceedings.[18]

---

[18] Since the district court took no evidence on the question of damages, this issue, as well as the liability for damages of individual directors of Wheaton-Haven, requires a further hearing. It is clear that an award of monetary damages is an appropriate remedy for violations of 42 U.S.C. §§1981, 1982. *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 238-240; *Lee v. Southern Home Sites Corp., supra*, 429 F.2d at 293-295 (C.A. 5); *Smith v. Sol D. Adler Realty Co., supra*, 436 F.2d at 350-351 (C.A. 7); *Knight v. Auciello, supra,*

(continued)

Respectfully submitted,

ALLISON W. BROWN, JR.
Suite 501, 1424 – 16th St., N.W.
Washington, D.C. 20036

RAYMOND W. RUSSELL
22 West Jefferson Street
Rockville, Maryland 20850

SAMUEL A. CHAITOVITZ
30 W. 60th Street
New York, N.Y. 10023

Attorneys for Petitioners

Of Counsel:

MELVIN L. WULF
American Civil Liberties Union
156 Fifth Avenue
New York, N.Y. 10010

June 1972.

---

[18] (continued) 453 F.2d 852 (C.A. 1); *Brown v. Ballas, supra,* 331 F. Supp. at 1037 (N.D. Tex.); *Williamson v. Hampton Management Co.*, 339 F. Supp. 1146, 1149 (N.D. Ill., 1972). Moreover, on the basis of the complaint's allegations, the directors who participated in the discrimination against petitioners are liable for damages, along with the corporation, based on their roles in the wrongful conduct. See *National Cash Register Co. v. Leland*, 94 Fed. 502, 508-511 (C.A. 1, 1899), cert. denied, 175 U.S. 724; *Trounstine v. Bauer, Pogue & Co.*, 144 F.2d 379, 382 (C.A. 2, 1944), cert. denied, 323 U.S. 777; *Hitchcock v. American Plate Glass Co.*, 259 Fed. 948, 952-953 (C.A. 3, 1919); *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-409 (C.A. 10, 1958); *American Universal Insurance Co. v. Scherfe Insurance Agency*, 135 F. Supp. 407, 415-416 (S.D. Iowa, 1954).

(continued)

---

[18] (continued)

One director, Richard E. McIntyre, who has been separately represented in this litigation, argues that the case should be dismissed as to him because he did not agree with the board of directors' racial policies and because he did not participate in the discrimination. This, of course, is a matter for determination upon the taking of evidence in the trial court. In any event, McIntyre's deposition shows that he knew of Dr. and Mrs. Press' desire to become members, that he told them they were unacceptable to the board because of their race, and that he never made any formal move at a board meeting to admit them to membership (A. 104-105). In addition, at one board meeting in the summer of 1968, when Wheaton-Haven's guest policy was under discussion, McIntyre admittedly, made a motion "to bar all Negro guests" (A. 116). McIntyre was at the board meeting on July 20, 1968, when the vote was taken to adopt the racially discriminatory guest policy. He claims he did not vote, but the official minutes of the meeting record him as being present and state that the vote for the guest policy was *unanimous* (A. 41-42).